

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35174

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 726
	)	
Plaintiff-Respondent,	)	Filed: December 15, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
ROGER L. HUBBARD,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Renae J. Hoff, District Judge.

Judgment of conviction and sentences for second degree murder, second degree kidnapping, and felony eluding a police officer, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

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LANSING, Chief Judge

Roger L. Hubbard was found guilty by a jury of second degree murder, second degree kidnapping, and felony eluding a police officer. He appeals from the judgment of conviction, asserting that the prosecutor committed misconduct during closing argument by improper references to evidence that had been admitted for a limited purpose. Hubbard also argues on appeal that his sentence is excessive.

I.

BACKGROUND

In September of 2006, Hubbard and his wife, Colleen Hubbard, were separated. Colleen went to Hubbard's residence one night to pick up their children. At some point that evening, Hubbard stabbed her four times in her back and shoulders and put her in the trunk of her car. She was able to use her cell phone to call police, who responded to Hubbard's residence. As

police approached the residence Hubbard fled in Colleen's car, with Colleen still in the trunk, and led police on a chase through residential neighborhoods and a college campus. When one of the car's tires blew out, Hubbard abandoned that car and fled on foot, but he was apprehended. Officers found Colleen still alive in the trunk of the car, but she soon lost consciousness. Attempts to resuscitate her failed, and she died from the loss of blood from the stab wounds. Hubbard was charged with second degree murder, Idaho Code §§ 18-4001, 18-4002, 18-4003(g), second degree kidnapping, I.C. §§ 18-4501, 18-4503, felony eluding a police officer, I.C. § 49-1404(2), and the prosecutor alleged a sentence enhancement for use of a deadly weapon, I.C. § 19-2520, in the commission of the murder and kidnapping.

At trial, Hubbard testified that he stabbed Colleen, but did so in self-defense because Colleen was attacking him with a tire iron. A tire iron was found outside Hubbard's residence in close proximity to a pool of blood. Anticipating a self-defense claim, prior to trial the State moved to admit certain statements Colleen made in a telephone call to her boyfriend, Michael Rhamey, on the night of her death. According to Rhamey's testimony, Colleen telephoned and told him that she had a flat tire and someone was fixing it for her, but as soon as it was fixed she would pick up the children and then go home. In response to a hearsay objection, the district court held that Colleen's statement was admissible pursuant to Idaho Rule of Evidence 803(3) for the limited purpose of showing Colleen's intent and her plans, but not to prove the truth of her statement that the tire was flat. After making its ruling, the court offered to instruct the jury on the purpose for which the statement was being admitted and told Hubbard, "I'll give you a minute. Let me know how you want to proceed." Thereafter, the record does not reflect that Hubbard ever requested a limiting instruction on the use of this evidence, and none was given. The prosecutor referred to Rhamey's testimony a number of times during closing argument, and Hubbard did not object at that time.

The jury found Hubbard guilty of all charges. Hubbard was sentenced to a unified forty-five-year term of imprisonment with twenty-five years fixed for second degree murder, twenty years with ten years fixed for second degree kidnapping, and five years fixed for felony eluding a police officer, all to be served concurrently.

Hubbard appeals, arguing that the prosecutor committed misconduct in closing argument by referring to Rhamey's testimony as evidence that Colleen's tire was flat even though the

testimony was admitted only for the limited purpose of showing Colleen's intent or plan.<sup>1</sup> Hubbard contends this misconduct constitutes fundamental error and deprived him of his due process right to a fair trial. He also argues that the trial court abused its discretion by imposing an excessive sentence.

## II. DISCUSSION

### A. Prosecutorial Misconduct

Hubbard did not object to the statements that he now claims constitute prosecutorial misconduct. When an issue is not preserved for appeal through a timely objection, it will be examined on appeal only for fundamental error. *State v. Lovelass*, 133 Idaho 160, 167, 983 P.2d 233, 240 (Ct. App. 1999). The Idaho Supreme Court has defined fundamental error as: "such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." *State v. Christiansen*, 144 Idaho 463, 470, 163 P.3d 1175, 1182 (2007); *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989). It has also been defined as an "error which 'so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his constitutional right to due process,'" *State v. Sheahan*, 139 Idaho 267, 281, 77 P.3d 956, 970 (2003) (quoting *State v. Mauro*, 121 Idaho 178, 180, 824 P.2d 109, 111 (1991)).

When evidence has been admitted for a limited purpose, it is prosecutorial misconduct to use the evidence for any other purpose during closing argument. *State v. Hairston*, 133 Idaho 496, 507-08, 988 P.2d 1170, 1181-82 (1999); *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Prosecutorial misconduct in closing argument will be considered a fundamental error when it is "calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence." *State v. Porter*, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997) (quoting *State v. Babb*, 125 Idaho 934, 942, 877 P.2d 905, 913 (1994)); *State v.*

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<sup>1</sup> Hubbard does not argue on appeal that the trial court's admission of Rhamey's testimony was erroneous, nor does the State argue that the court erred in limiting the purpose for which the evidence could be used. Therefore, for purposes of this opinion, we assume the correctness of the trial court's evidentiary ruling.

*Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003). If fundamental error is established, this Court next considers whether that error was harmless. *Christiansen*, 144 Idaho at 471, 163 P.3d at 1183; *State v. Reynolds*, 120 Idaho 445, 448, 816 P.2d 1002, 1005 (Ct. App. 1991).

In this case, the prosecutor was discussing the timeline of events on the night of Colleen's death when he stated:

She makes a call to Michael Rhamey, her boyfriend, who she moved in with the day before. Michael Rhamey said she said something about a flat tire, someone was going to help her fix it, she'd be home in about fifteen minutes, she was going to pick up the girls; not that I was sitting at Roger's house, I'm waiting for him, Roger and I were fighting, not come over and help me get the kids and let's go beat up Roger, nothing about Roger Hubbard in that phone call and no testimony about that.

This statement was a permissible discussion of the evidence. The prosecutor was discussing Rhamey's testimony to show that Colleen's intentions and plans at that time did not include a plan to attack Hubbard. Demonstrating her intent and plan is exactly the purpose for which the evidence was admitted.

The prosecutor went on, however, to impermissibly comment on Rhamey's testimony when he stated, in the context of discussing the implications of the physical evidence found at the scene of the crime:

Physical evidence of the murder at the scene of the killing? The pool of blood by her car, the drops near her car, the tire iron, the flashlight. Why is the tire iron and the flashlight important? *She tells Michael Rhamey she has a flat tire and someone--or had a flat and somebody's going to come and help her fix it.*

When you look at the physical evidence--he tries to say in his letter he doesn't know how or when she got the tire iron, he doesn't see the trunk open at any time, so all of the sudden, he's hit with a tire iron. He wants you to believe that she took that out to use as a weapon against him.

Based on the testimony and based on the physical evidence inside the trunk and outside the trunk, it's consistent with somebody that has some sort of tire problem. The flashlight because it's dark out. Tire iron, the jack, the donut tire screw is unscrewed. The pool of blood on the driver's side of where the car would be.

Additionally, during his rebuttal closing argument the prosecutor stated,

They talk about the fact there were no flat tires on the driver's side, so therefore, she could not have possibly been looking to change any tires on the driver's side. *Well, all I know is that Michael Rhamey testified uncontradicted that she said she had one. . . .* Is it possible she didn't have a flat tire and she was just calling up

Michael Rhamey to set a trap, come up with an alibi? Reasonable doubt, not imaginary doubt, not possible or mere possible.

These statements use Michael Rhamey's testimony to bolster the prosecutor's argument that Colleen had a flat tire, and that was why the tire iron was found at the scene of the accident. Relying upon Michael Rhamey's testimony as evidence that Colleen had a flat tire was prosecutorial misconduct because it contravened the trial court's order that the testimony was admitted only for the limited purpose of showing Colleen's intent and plans that night.

Although prosecutorial misconduct has been demonstrated, we cannot conclude that it rose to the level of fundamental error. The prosecutor's argument amounted to a rather slight and subtle misuse of evidence that had been admitted for another purpose. The argument was not inflammatory nor of a nature that would arouse passion or prejudice against the defendant. Apart from the testimony of Michael Rhamey that was misused by the prosecutor, there was other evidence suggesting Colleen had a flat tire: a flashlight was found near the tire iron, a jack was loose in the trunk instead of inside the spare tire area, and the screw holding the spare tire flap down was unfastened. Furthermore, because no limiting instruction was requested by Hubbard, the jury was not instructed against using Rhamey's testimony as evidence that Colleen had a flat tire, so it is likely they would have used the testimony for that purpose even absent the prosecutor's improper closing argument. Given the subtlety of the distinction between the permissible and impermissible uses of Rhamey's testimony, the absence of a limiting instruction regarding that testimony, and the non-inflammatory nature of the prosecutor's comments, the prosecutorial misconduct here did not profoundly distort the trial or go to the foundation of Hubbard's rights such that he was deprived of a fair trial. Thus, we hold that although the prosecutor's statements amounted to prosecutorial misconduct, they were not fundamental error that could warrant relief on appeal in the absence of objection below.

#### **B. Excessive Sentence**

Hubbard next contends that his unified forty-five-year sentence with twenty-five years fixed for second degree murder is excessive in view of the absence of any prior criminal convictions, abusive behavior toward Colleen, or other history of violence and in view of his record of honorable military service.

Where a sentence is within the statutory limits, it will not be disturbed on appeal absent an abuse of the sentencing court's discretion. *State v. Hedger*, 115 Idaho 598, 604, 768 P.2d 1331, 1337 (1989); *State v. Stone*, 147 Idaho 330, 334, 208 P.3d 734, 738 (Ct. App. 2009). We

will not conclude on review that the sentencing court abused its discretion unless the sentence is unreasonable under the facts of the case. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992); *State v. Bowcut*, 140 Idaho 620, 621, 97 P.3d 487, 488 (Ct. App. 2004); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). The objectives of sentencing, against which the reasonableness of a sentence is to be measured, are the protection of society, the deterrence of crime, the rehabilitation of the offender and punishment or retribution. *Id.* In evaluating the reasonableness of a sentence, we conduct an independent review of the record, focusing on the nature of the offense and the character of the offender. *Stone*, 147 Idaho at 334, 208 P.3d at 738; *State v. Young*, 119 Idaho 510, 511, 808 P.2d 429, 430 (Ct. App. 1991).

Although Hubbard is correct in claiming that he had no prior criminal record or reports of domestic violence, the murder that he committed was vicious and depraved. He stabbed his wife four times in the back and shoulders with sufficient force to cut ribs and vertebrae and to puncture her lung. He then elected to lead police on a chase with Colleen in the trunk of the car, bleeding to death, rather than allow her to obtain medical attention. Although there had been no prior calls to police regarding domestic violence, there was evidence that after Colleen and Hubbard separated, he stalked her and threatened to kill her. After the murder, he was unrepentant. He wrote letters from jail expressing disdain for Colleen and blaming her for his actions and the consequences he was experiencing. One letter, for example, raged:

I swear that b---- has been screwing me over since she left and is still doing it . . .  
I don't think I could hate anyone more, even dead I hate her. She attacks me over something I said and now my life is over. As far as forgiving her I would rather cut my arms off.

Even considering Hubbard's lack of criminal history and other positive attributes, the brutal nature of the offense and Hubbard's character, as revealed through his mistreatment of Colleen before the murder and his lack of remorse thereafter, support the sentence. We find no abuse of discretion in the sentence imposed.

### **III.**

#### **CONCLUSION**

Although prosecutorial misconduct occurred at Hubbard's trial, it did not rise to the level of fundamental error. Hubbard's sentence for second degree murder is not excessive. Therefore, the judgment of conviction and sentences are affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**